

CLERK'S COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 810

**GEORGE W. O'MALLEY, INDIVIDUALLY AND AS COL-
LECTOR OF INTERNAL REVENUE, APPELLANT**

vs.

JOSEPH W. WOODROUGH AND ELLA B. WOODROUGH

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF NEBRASKA**

FILED MARCH 25, 1939

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 810

GEORGE W. O'MALLEY, INDIVIDUALLY AND AS COL-
LECTOR OF INTERNAL REVENUE, APPELLANT

vs.

JOSEPH W. WOODROUGH AND ELLA B. WOODROUGH

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF NEBRASKA

INDEX

	Original	Print
Record from D. C. U. S., District of Nebraska.....	1	1
Caption [omitted in printing].....	1	1
Petition.....	2	1
Exhibit A—Claim for refund.....	10	6
Exhibit B—Letter rejecting claim.....	11	7
Exhibit C—Notice of disallowance of claim.....	12	8
Motion to dismiss.....	13	9
Order overruling motion to dismiss.....	14	9
Statement of defendant re intention to stand upon motion to dismiss.....	15	9
Order supplementing order overruling motion to dismiss.....	16	10
Motion for judgment on the pleadings.....	18	11
Judgment.....	20	12
Petition for appeal.....	22	13
Assignment of errors.....	23	14
Order allowing appeal.....	28	15
Citation and service [omitted in printing].....	37	15
Praecept for transcript of record.....	39	15
Clerk's certificate [omitted in printing].....	41	16
Statement of points to be relied upon and designation as to printing record.....	42	16

I

[Caption omitted.]

IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA, OMAHA DIVISION

Law No. 3763

JOSEPH W. WOODROUGH AND ELLA B. WOODROUGH, PLAINTIFFS

vs.

GEORGE W. O'MALLEY, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL
REVENUE, DEFENDANT

Petition at law

Filed June 9, 1938

Come now the plaintiffs and for cause of action against the defendant, allege:

I

Plaintiff, Joseph W. Woodrough, is and, at the times herein mentioned, was a resident of the City of Omaha, State of Nebraska.

Plaintiff, Ella B. Woodrough, is and, at the times herein mentioned, was the wife of the plaintiff, Joseph W. Woodrough, and is a resident of the City of Omaha, State of Nebraska.

II

Defendant, George W. O'Malley, is and, at the times herein mentioned, was the duly appointed, qualified, and acting Collector of Internal Revenue of the United States, for the District of Nebraska, with offices in the Federal Building at Omaha, Nebraska.

III

This is a civil cause arising under the Constitution and Laws of the United States, and under a law providing for Internal Revenue, and for the recovery of internal revenue taxes erroneously or illegally assessed and collected by the Defendant.

IV

Plaintiff, Joseph W. Woodrough, prior to the 6th day of June 1932, was a duly appointed Judge of the United States District Court of the United States. On April 12, 1933, Joseph W. Woodrough was appointed a Judge of the United States Circuit Court of Appeals for the Eighth Circuit, and took oath and qualified as such Judge on May 1, 1933; and up to the present time, has been, a Judge of the said United States Circuit Court of Appeals.

V

Prior to March 15, 1937, Plaintiff, Joseph W. Woodrough, and plaintiff, Ella B. Woodrough, filed a joint income-tax return for the calendar year 1936 with said George W. O'Malley, Collector of Internal Revenue, at Omaha, Nebraska, showing the total income of the said plaintiffs, which income included the salary of Joseph W. Woodrough as a Judge of the United States Circuit Court of Appeals of the United States in the sum of \$12,500.00, and which sum of \$12,500.00 the plaintiffs herein claimed not to be subject to Federal income taxes. As hereinafter detailed, Plaintiffs allege that, as a result of such alleged exemption and exclusion of the said salary of \$12,500.00 from any Income Taxes, such salary is not subject to taxation under any Federal Income Tax Law, and no Federal Income Tax in the premises was payable by the said Plaintiffs to the United States of America.

VI

Thomas P. Smith, the duly appointed Internal Revenue Agent in charge, in Omaha, Nebraska, thereafter made an examination of the said return so filed, and on the 8th day of October 1937 proposed the assessment of a deficiency against the said plaintiffs in the sum of \$631.60 for the year 1936. The said proposed assessment of deficiency reflected the inclusion, by said Internal Revenue Agent in charge, of the said judicial salary of \$12,500.00 as a part of the gross income of said Joseph W. Woodrough, subject to income taxes levied
4 by the United States, under Section 22. (a) of the Revenue Act of 1936. Plaintiffs alleged that, without the inclusion of the said salary of \$12,500.00 received by the said plaintiff as a Judge of the Circuit Court of the United States, no Federal income taxes of any character would have been payable by the said plaintiffs to the United States of America.

VII

Plaintiffs allege that a protest was filed on the 4th day of November 1937 with the said Internal Revenue Agent in charge at Omaha, Nebraska, protesting the assessment of the said deficiency for the reason that the said salary of Joseph W. Woodrough, as a Judge of the Circuit Court of Appeals of the United States, was not subject to taxation under the Internal Revenue Laws of the United States and under the Constitution of the United States, as hereinafter detailed.

VIII

On the 15th day of December 1937 plaintiffs paid to the said George W. O'Malley the said sum of \$631.60, under protest, together with the sum of \$28.42 as interest thereon from the 15th day of March 1937 to the 15th day of December 1937.

IX

On the 15th day of December 1937 the plaintiffs, Joseph W. Woodrough and Ella B. Woodrough, filed with the said George W. O'Malley, Collector of Internal Revenue, a claim for refund of the said amount of \$631.60 and interest in the sum of \$28.42, a copy of which claim for refund is attached hereto, marked "Exhibit A," and made a part hereof.

X

Thereafter, on the 28th day of January 1938 the Commissioner of Internal Revenue, Washington, D. C., disallowed the said claim for refund, in accordance with the letter attached hereto, marked "Exhibit B," and made a part hereof. Thereafter, by letter dated March 2, 1938, the said plaintiffs were notified by the office of the Commissioner of Internal Revenue, Washington, D. C., of the disallowance of the said claim, showing the disallowance thereof as appearing on Schedule numbered 23908, a copy of which letter is attached hereto, marked "Exhibit C," and made a part hereof.

XI

The plaintiff, Joseph W. Woodrough, prior to the 1st day of May 1933, was a Judge of the United States District Court, receiving a salary as a Judge of the United States District Court of \$10,000.00 per annum. On the 12th day of April 1933, the plaintiff, Joseph W. Woodrough, was appointed a Judge of the Circuit Court of Appeals of the United States and took oath of office on the 1st day of May, 1933, and as a Judge of the United States Circuit Court of Appeals received a salary of \$12,500.00 per annum for the balance of the year 1933 and for the years 1934, 1935, and 1936, under Section 213, Title 28, United States Code Annotated, which provides as follows:

"There shall be in the sixth, seventh, and tenth circuits, respectively, four circuit judges; and in the second and eighth circuits, respectively, five circuit judges; and in each of the other circuits, three circuit judges, to be appointed by the President, by and with the advice and consent of the Senate. Each circuit judge shall receive a salary of \$12,500 a year, payable monthly. Each circuit judge shall reside within his circuit, and when appointed shall be a resident of the circuit for which he is appointed. The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law. Nothing in this section shall be construed to prevent any circuit judge holding district court or otherwise, as provided by other sections of the Judicial Code. (As amended Dec. 13, 1926, c. 6, Sec. 1, 44 Stat. 919; Feb. 28, 1929, c. 363, Sec. 2, 45 Stat. 1347.)"

XII

Section 1 of Article III of the Constitution of the United States of American provides:

6 "The judicial power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a Compensation, which shall not be diminished during their Continuance in Office."

XIII

The plaintiffs allege that the provisions of Section 22 (a) of the Revenue Act of 1936, to-wit:

"In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly"—

are in violation of Section 1 of Article III of the Constitution of the United States of America and are unconstitutional.

The plaintiffs further allege that the enforcement of the above-quoted provisions of Section 22 (a) of the Revenue Act of 1936 would create a situation whereby the compensation of the Judges of the United States Courts, and particularly of this plaintiff, Joseph W. Woodrough, would no longer be definite and certain and payable at stated times, and would be subject to fluctuation, depending upon the plaintiff's other income, credits and deductions, and the further conscience or caprice of Congress, all in violation of and contrary to Section 1 of Article III of the Constitution of the United States of America, and therefore unconstitutional.

The plaintiffs further allege that the enforcement of the provisions of Section 22 (a) of the Revenue Act of 1936 would create an anomalous situation whereby no two judges appointed subsequent to June 6, 1932, would receive the same salary, and none of them would receive the salary provided for such judges appointed prior to June 6, 1932, all of which is in violation of and contrary to the purpose, spirit, and letter of said Section 1 of Article III of the Constitution of the United States, and contrary to the decisions of the United States Supreme Court in construction thereof.

XIV

The Revenue Act of 1932 was in force and effect at the time the plaintiff, Joseph W. Woodrough, was appointed a Judge of the Circuit Court of Appeals of the United States for the 8th Circuit, but said Revenue Act of 1932 was repealed by the enactment of the Revenue Act of 1934. The Revenue Acts of 1934 and 1936 were

enacted subsequent to the date that the plaintiff, Joseph W. Woodrough, was appointed and qualified as a Judge of the Circuit Court of Appeals of the United States, and the enforcement of said Revenue Acts of 1934 and 1936 would diminish the salary of the plaintiff, Joseph W. Woodrough, during his continuance as a Judge of the Circuit Court of Appeals of the United States, in violation of Section 1 of Article III of the Constitution of the United States. The plaintiffs therefore allege that there is not now, and during the year 1936 was not, in existence a valid law of the United States under which a tax on the salary of the plaintiff, Joseph W. Woodrough, as a Judge of the Circuit Court of Appeals of the United States could be assessed or imposed.

XV

The plaintiffs further allege that the said Section 22 (a) of the Revenue Act of 1936 is in violation of the limitations which are implicit in Article I, Article II, and Article III of the Constitution of the United States of America which create the three separate and independent departments of the Government, and that said Section 22 (a) of the Revenue Act of 1936 is unconstitutional and in violation of said Article I, Article II, and Article III of the Constitution of the United States of America.

XVI

The plaintiffs further allege that the said Section 22 (a) of the Revenue Act of 1936, and the enforcement thereof is in violation of Article V of the Amendments to the Constitution of the United States of America, in that the property of the plaintiffs is being ~~taken~~ without due process of law and for public use without just compensation, and is arbitrary, capricious, and discriminatory, all of which is in violation of said Article V of the Amendments to the Constitution of the United States of America.

XVII

The plaintiffs further allege that following the appointment of the plaintiff, Joseph W. Woodrough, as a Judge of the Circuit Court of Appeals of the United States, the Congress of the United States, by the enactment of the Revenue Acts of 1934 and 1936, increased the amount of income taxes payable upon the same amount of income under the Revenue Act of 1932; and as a result thereof, if said Revenue Acts of 1932, 1934, and 1936 were enforced, the salary of the said plaintiff, Joseph W. Woodrough, as a Judge of the Circuit Court of Appeals of the United States, would be decreased by the assessment and collection of larger amounts of income taxes, under the Revenue Acts of 1934 and 1936, all of which is in violation of and contrary to the purpose, spirit, and letter of Section 1 of Article III of the Constitution of the United States of America and therefore unconstitutional.

XVIII

The plaintiffs allege that by reason of the wrongful, unlawful, and unconstitutional assessment of income taxes against the said plaintiffs, and the erroneous and illegal collection thereof by the defendant, which the said plaintiffs paid to the defendant under protest, and for which a refund was denied, as herein alleged, there is due to the said plaintiffs from the said defendant the sum of \$660.02, with interest thereon at the rate of 6% per annum from December 15, 1937.

9 Wherefore, plaintiffs pray judgment against the defendant for the sum of \$660.02, with interest thereon at the rate of 6% per annum from December 15, 1937, and the costs of this action.

JOSEPH W. WOODROUGH,

Plaintiff.

ELLA B. WOODROUGH,

Plaintiff.

Counsel for Plaintiffs: Kennedy, Holland, DeLacy & Syoboda.

[Duly sworn to by Joseph W. Woodrough and Ella B. Woodrough; jurat omitted in printing.]

10

Exhibit A to petition

CLAIM—TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE
OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

(x) Refund of Tax Illegally Collected.

STATE OF NEBRASKA

County of Douglas, ss.

Name of Taxpayer or purchaser of stamps: Joseph W. Woodrough, and Ella B. Woodrough.

Business address: 303 A Federal Building Omaha, Nebraska.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Omaha, Nebraska.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1936, to December 31, 1936.

3. Character of assessment or tax: Income tax which was paid under protest for reason stated.

4. Amount of assessment: \$631.60 plus interest of \$28.42; dates of payment: December 14, 1937.

5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$660.02.

7. Amount to be abated (not applicable to income or estate tax).

8. The time within which this claim may be legally filed expires, under Section 322 (b) (1) of the Revenue Act of 1936, on December 15, 1939.

The deponent verily believe that this claim should be allowed for the following reasons—

The amount of the above assessment was based upon the inclusion of the sum of \$12,500.00 as salary of Judge Joseph W. Woodrough, a Judge of the United States Circuit Court of Appeals of the United States, as being income subject to income tax. The taxpayer contends that Section 22-a of the Revenue Act of 1936, as well as Section 22-a of the Revenue Acts of 1932 and 1934, under which the assessment has been made are unconstitutional and contrary to Section I of Article III of the Constitution of the United States of America, and are further unconstitutional generally under the Constitution of the United States of America, and that under the Constitution of the United States of America the salary of a Judge of the United States Courts, including Judge Joseph W. Woodrough, is not subject to assessment under the income tax laws or any Act of Congress. That further the salary of Judge Joseph W. Woodrough, as a Judge of a United States Court, is exempt from taxation under any Act of Congress.

(Signed) JOSEPH W. WOODROUGH.
ELLA B. WOODROUGH.

Sworn to and subscribed before me this 15 day of December, 1937.

[SEAL]

DORIS E. ANDERSON, *Notary Public.*

11

Exhibit B to petition

TREASURY DEPARTMENT,
Washington, January 28, 1938.

Office of Commissioner of Internal Revenue. Address Reply to Commissioner of Internal Revenue and refer to IT; RRR.

JOSEPH W. and ELLA B. WOODROUGH,
303A Federal Building, Omaha, Nebraska.

SIR AND MADAM: Reference is made to your claim for refund of \$660.02, income tax and interest paid for the taxable year 1936.

The claim is based upon the following statement:

"The amount of the above assessment was based upon the inclusion of the sum of \$12,500.00 as salary of Judge Joseph W. Woodrough, a Judge of the United States Circuit Court of Appeals of the United States, as being income subject to income tax. The taxpayer contends that Section 22-a of the Revenue Act of 1936, as well as Section 22-a of the Revenue Acts of 1932 and 1934, under which the assessment has been made, are unconstitutional and contrary to Section I of Article III of the Constitution of the United States of America, and are further unconstitutional generally under the Constitution of the United States of America, and that under the Constitution of the United States of America the salary of a judge of the United States Courts, including Judge Joseph W. Woodrough, is not subject to assessment under the income-tax laws or any Act of

Congress. That further the salary of Judge Joseph W. Woodrough, as a Judge of a United States Court, is exempt from taxation under any Act of Congress."

Section 22 of the Revenue Act of 1936 provides:

"Sec. 22. Gross income.—(a) General definition.—'Gross income' includes gains, profits, and income from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, or * * *. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly."

In view of the provisions of section 22 (a) of the Revenue Act of 1936, the Bureau has no alternative than to reject your claim.

The disallowance of your claim will officially appear on a schedule to be approved by the Commissioner.

Respectfully,

W. T. SHERWOOD,
Acting Deputy Commissioner.

12

Exhibit C to petition

TREASURY DEPARTMENT,
Washington, Mar. 2, 1938.

Office of Commissioner of Internal Revenue. Address reply to Commissioner of Internal Revenue and refer to IT:CI:CC-4-CCP.

JOSEPH W. and ELLA B. WOODROUGH,
303 A Federal Building, Omaha, Nebraska.

In re: Claim for refund of \$660.02 for the year 1936

SIR AND MADAM: Reference is made to Bureau letter dated January 28, 1938, wherein you were informed that the claim for refund indicated above would be disallowed. The letter also stated the reasons for the proposed disallowance.

The claim having been disallowed or rejected on Schedule numbered 23908, this notice of disallowance is sent to you by registered mail as required by Section 1103 (a) of the Revenue Act of 1932.

Respectfully,

GUY T. HELVERING,
Commissioner.

By W. T. SHERWOOD,
Acting Deputy Commissioner.

[File endorsement omitted.]

13

In United States District Court

[Title omitted.]

Motion to dismiss

Filed Sept. 26, 1938

Comes now the defendant and moves the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against the defendant upon which relief can be granted.

JOSEPH T. VOTAVA,

United States Attorney for the District of Nebraska, Attorney for George W. O'Malley, individually and as collector of internal revenue, defendant; address, 306 Post Office Building, Omaha, Nebraska.

Service of the foregoing Motion to Dismiss was made on the plaintiff herein this 26th day of September, 1938, by mailing a copy thereof to the plaintiff's attorney of record, Edward J. Svoboda, 1502 City National Bank Bldg., Omaha, Nebraska.

JOSEPH T. VOTAVA,

United States Attorney for the District of Nebraska, Attorney for George W. O'Malley, individually and as collector of internal revenue, defendant.

[File endorsement omitted.]

14

In United States District Court

[Title omitted.]

Order overruling motion to dismiss

Filed Feb. 6, 1939

The motion of the defendant to dismiss the plaintiffs' petition in the above-entitled case having been heretofore argued and submitted, it is ordered that the motion of the defendant be overruled, and an exception is granted to the defendant.

THOS. C. MUNGER, Judge.

[File endorsement omitted.]

15

In United States District Court

[Title omitted.]

Statement of defendant re intention to stand upon motion to dismiss

Filed Feb. 24, 1939

Comes now the defendant and for purposes of record states unto the Court that the defendant does not intend to plead further and

that he relies and stands upon the Motion to Dismiss heretofore filed herein and which was overruled.

This statement is made for the purpose of advising the Court that appropriate action for final judgment may be entered herein.

GEORGE W. O'MALLEY,
Individually and as Collector of Internal Revenue, Defendant,
By JOSEPH T. VOTAVA,
United States Attorney for the District of Nebraska,
Attorney for Defendant,
Address, 306 Post Office Building, Omaha, Nebraska.

Service of the foregoing Statement of Defendant was made on the Plaintiff herein this 24th day of February 1939, by mailing a copy thereof to the Plaintiff's Attorney of record, Edward J. Svoboda, City National Bank Bldg., Omaha, Nebraska.

JOSEPH T. VOTAVA,
United States Attorney for the District of Nebraska, Attorney for Defendant, George W. O'Malley, individually and as Collector of Internal Revenue.

[File endorsement omitted.]

[Title omitted.]

Order supplementing order overruling motion to dismiss

Filed March 18, 1939

Whereas it appears that the defendant desires to appeal to the United States Supreme Court directly from this Court, in order to have an early determination of the questions involved herein, the Court feels that it should amplify and set forth the grounds on which defendant's Motion to Dismiss was overruled, in order that it may clearly appear whether or not the grounds for the overruling of said Motion were the Court's conclusion that Section 22 (a) of the Revenue Act of 1936 (C. 690, 49 Statutes 1648), is invalid because contrary to the provisions of the Constitution of the United States,

Now, therefore, in order to clearly set forth the grounds for overruling said Motion to Dismiss, the Court supplements its Order entered herein on February 6, 1939, as follows:

1. The Court has reached the conclusion that Section 22 (a) of the Revenue Act of 1936 (C. 690, 49 Statutes 1648), requiring the inclusion in gross income of the compensation received by plaintiff Joseph W. Woodrough, as Judge of the United States Circuit Court of Appeals for the Eighth Circuit, is invalid and contrary to the Constitution of the United States, since said Joseph W. Woodrough had taken office after June 6, 1932, and prior to the enactment of the aforesaid statute.

2. The Court has further reached the conclusion that said Section 22 (a) of the Revenue Act of 1936 (C. 690, 49 Statutes 1648), requiring the inclusion in gross income of the compensation received by plaintiff, Joseph W. Woodrough, as Judge of the United States Circuit Court of Appeals for the Eighth Circuit, is invalid and of no force and effect for the reason that it contravenes the provisions of the Constitution of the United States, and that said Act is void and of no effect irrespective of the fact that said plaintiff, Joseph W. Woodrough, took office after June 6, 1932, and prior to the passage of said Act.

3. The Court has further reached the conclusion that Section 22 (a) of the Revenue Act of 1936 (C. 690, 49 Statutes 1648), requiring the inclusion in gross income of the compensation received by plaintiff, Joseph W. Woodrough, as Judge of the United States Circuit Court of Appeals for the Eighth Circuit, is invalid and is repugnant to Article III, Section 1, of the Constitution of the United States.

4. The Court has reached the further conclusion that the provisions of Section 22 (a) of the Revenue Act of 1936 (C. 690, 49 Statutes 1648), requiring the inclusion in gross income of the compensation received by plaintiff, Joseph W. Woodrough, as Judge of the United States Circuit Court of Appeals for the Eighth Circuit, is invalid and of no force because repugnant generally to the Constitution of the United States, and particularly Article I, Article II, and Article III, and the Fifth Amendment thereof.

In consideration of the conclusions reached by the Court as hereinbefore set forth, it is hereby ordered that this Order be forthwith entered as an amendment to the Order entered herein on February 6, 1939.

THOS. C. MUNGER, Judge.

[File endorsement omitted.]

18 In United States District Court

[Title omitted.]

Motion for judgment on the pleadings

Filed March 18, 1939

Come now the Plaintiffs and move the Court to enter Judgment in favor of the Plaintiffs, as prayed in the Plaintiffs' Petition, for the following reasons:

I

The Plaintiffs filed their Petition in the above entitled matter and service was duly had upon the Defendant.

II

Thereafter the Defendant filed a Motion to Dismiss the Petition on the ground that the Petition failed to state a cause of action.

III

The said Motion to Dismiss was argued and an order overruling same was made on the 6th day of February, 1939.

IV

Thereafter the Defendant filed a Statement that Defendant would not plead further, and that Defendant relies and stands upon the Motion to Dismiss, theretofore filed, and which was overruled.

KENNEDY, HOLLAND, DELACY & SVOBODA,
By RALPH E. SVOBODA,
1502 City National Bank Building, Omaha, Nebraska,
Attorneys for Plaintiffs,
Joseph W. Woodrough and Ella B. Woodrough.

19 Service of the foregoing Motion of Plaintiffs for Judgment on the Pleadings and receipt of copy thereof are hereby acknowledged, this 17th day of March, 1939, and consent is hereby given to the immediate submission of the said Motion to the Court for ruling.

JOSEPH T. VOTAVA,
United States Attorney for the District of Nebraska,
Attorney for Defendant, George W. O'Malley,
Individually and as Collector of Internal Revenue.

[File endorsement omitted.]

20 In United States District Court, District of Nebraska, Omaha
Division

Law No. 3763.

JOSEPH W. WOODROUGH AND ELLA B. WOODROUGH, PLAINTIFFS

vs.

GEORGE W. O'MALLEY, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL
REVENUE, DEFENDANT

Judgment

Filed March 18, 1939

This cause came on to be heard on the Petition at Law of the Plaintiffs, and the Defendant having filed a Motion to Dismiss, which was heretofore overruled by the Court, and the Defendant having filed a statement that he does not intend to further plead herein, and that he relies and stands upon the Motion to Dismiss, overruled as aforesaid, and the Plaintiffs having filed a Motion for Judgment upon the pleadings and the Defendant having consented to the immediate submission of such Motion to the Court, and the parties by their Counsel having argued and presented the same to the Court,

The Court now finds that Plaintiffs' said Motion for Judgment upon the Pleadings should be sustained, for the reason that, in its application to the Plaintiffs herein, Section 22 (a) of the Revenue Act of 1936, being c. 790, 49 Stat. at L., 1648, is unconstitutional and void, and that, therefore, the Defendant has wrongfully and unlawfully assessed Income Taxes against the said Plaintiffs, and erroneously and illegally collected the same, and that a refund of such Income Taxes is due the Plaintiffs and should be ordered in the amount of \$660.02, with interest as provided by law.

And upon consideration of all of said proceedings and the foregoing Findings—

21 It is ordered, adjudged, and decreed that the Plaintiffs have Judgment against the Defendant in the sum of Six Hundred Sixty and 02/100 Dollars (\$660.02), with interest thereon at the rate of 6% per annum, from the 15th day of December 1937, together with the costs of this action.

Dated this 17th day of March 1939.

By the Court:

THOS. C. MUNGER, Judge.

[File endorsement omitted.]

22 In United States District Court

[Title omitted.]

Petition for appeal

Filed March 18, 1939

To the District Court of the United States for the District of Nebraska, Omaha Division, and to the Honorable Thomas C. Munger, one of the Judges thereof:

George W. O'Malley, individually and as Collector of Internal Revenue, feeling himself aggrieved by the final judgment made and entered in this cause on the 18th day of March 1939, does hereby appeal from said judgment to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors, which is filed herewith, and petitions that this appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings, and papers upon which said judgment is based, duly authenticated, may be transmitted to the Supreme Court of the United States at Washington, D. C.

Dated this 18th day of March 1939.

JOSEPH T. VOTAVA,

United States Attorney for the District of Nebraska,

Attorney for the Defendant.

[File endorsement omitted.]

[Title omitted.]

Assignment of errors

Filed March 18, 1939

Comes now the above-named defendant, George W. O'Malley, individually and as Collector of Internal Revenue, by his attorney, and in connection with his appeal says that in the record, proceedings, and final judgment in this case, manifest errors intervene to his prejudice and injury, and in connection with his said appeal assigns the following errors upon which he relies to reverse the judgment entered herein:

I

The Court erred in denying the defendant's motion to dismiss.

II

The Court erred in failing to hold valid and constitutional the provisions of Section 22 (a) of the Revenue Act of 1936 (c. 690, 49 Stat. 1648) requiring the inclusion in gross income of the compensation received by plaintiff, Joseph W. Woodrough, as judge of the United States Circuit Court of Appeals for the Eighth Circuit, since he had taken office after June 6, 1932.

III

The Court erred in failing to hold valid and constitutional the provisions of Section 22 (a) of the Revenue Act of 1936 (c. 690, 49 Stat. 1648), requiring the inclusion in gross income of the compensation received by plaintiff Joseph W. Woodrough as judge of the United States Circuit Court of Appeals for the Eighth Circuit, irrespective of the fact that he took office after June 6, 1932.

IV

The Court erred in holding that the provisions of Section 22 (a) of the Revenue Act of 1936 (c. 690, 49 Stat. 1648), requiring the inclusion in gross income of the compensation received by plaintiff Joseph W. Woodrough as judge of the United States Circuit Court of Appeals for the Eighth Circuit, are repugnant to Article III, Section 1 of the Constitution, or are contrary to any other provisions of the Constitution, express or implied.

V

The Court erred in failing to hold that the aforesaid provisions of Section 22 (a) of the Revenue Act of 1936 (c. 690, 49 Stat. 1648),

are in any event valid and constitutional as a result of the Sixteenth Amendment to the Constitution.

Wherefore, defendant prays that the judgment heretofore rendered and entered by the District Court be reversed and that said cause be remanded to the District Court with instructions to enter judgment for the defendant.

JOSEPH T. VOTAVA,

*United States Attorney for the District of Nebraska,
Attorney for the Defendant.*

[File endorsement omitted.]

28 In United States District Court

[Title omitted.]

Order allowing appeal

Filed March 20, 1939

The petition and motion of George W. O'Malley, individually and as Collector of Internal Revenue, for appeal from the final judgment and order of this Court, is hereby granted, and the said appeal is hereby allowed.

It is further ordered that a certified transcript of the record, proceedings, and papers be transmitted to the Supreme Court of the United States at Washington, D. C.

And it appearing that this appeal is taken by direction of a Department of the Government, namely, the Department of Justice, it is further ordered that no bond, obligation, or security shall be required from the appellant, either to prosecute the appeal or to answer in damages for costs.

Dated this 18th day of March 1939.

By the Court:

THOS. C. MUNGER, Judge.

[File endorsement omitted.]

37 [Citation in usual form showing service on Kennedy, Holland, DeLacy & Svoboda, filed March 20, 1939, omitted in printing.]

39 In United States District Court

[Title omitted.]

Præcipe for transcript of record

Filed March 20, 1939

To the CLERK:

Please prepare a transcript of the record in the above-entitled cause in the matter of appeal therein to the Supreme Court of the

United States, and include in said transcript in the order given below the following:

1. Petition together with exhibits thereto.
2. Motion to dismiss.
3. Order overruling Motion to dismiss.
4. Statement of Defendant.
5. Order amending Order of February 6, 1939.
6. Motion for Judgment on Pleadings.
7. Judgment.
8. Petition for appeal to the Supreme Court.
9. Assignment of Errors.
10. Statement as to Jurisdiction.
11. Order allowing appeal.
12. Notice of service on Appellees of Petition for Appeal, Order Allowing Appeal, Assignment of Errors and Statement as to Jurisdiction.
- 40 13. Citation.
14. Praecipe.

JOSEPH T. VOTAVA,

United States Attorney for the District of Nebraska.

This 20th day of March 1939.

Service of the foregoing Praecipe for Transcript of Record and the receipt of a copy thereof are hereby acknowledged this 20th day of March 1939, and it is hereby agreed that the matters set forth in said Praecipe shall constitute the entire transcript of record in this appeal.

KENNEDY, HOLLAND, DELACY & SVOBODA,
Attorneys for Appellees.

[File endorsement omitted.]

- 41 [Clerk's certificate to foregoing transcript omitted in printing.]

- 42 In the Supreme Court of the United States

Statement of points relied upon, and designation of entire record for printing

Filed March 28, 1939

Pursuant to Rule 13, paragraph 9, of the Revised Rules of this Court, appellant states that he intends to rely upon all the points in his assignment of errors.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for consideration of the points relied upon.

ROBERT H. JACKSON,
Solicitor General.

Service acknowledged this 21 day of March, 1939, and appellees hereby consent to the designation of record made above by appellant.

KENNEDY, HOLLAND, DELACY & SVOBODA,

Attorneys for Appellees.

[File endorsement omitted.]

[Endorsement on cover:] File No. 43,295. Nebraska, D. C. U. S. Term No. 810. George W. O'Malley, Individually and as Collector of Internal Revenue, Appellant, vs. Joseph W. Woodrough and Ella B. Woodrough. Filed March 25, 1939. Term No. 810 O. T. 1938.

MICROCARD

TRADE MARK



22



**MICROCARD[®]
EDITIONS, INC.**

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393

3

8

-

9

9



6

5

6